Public Service Company of Oklahoma (PSO) *and* International Brotherhood of Electrical Workers, Local Union No. 1002, AFL–CIO. Case 17–CA–16439

September 19, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On April 18, 1994, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Public Service Company of Oklahoma (PSO), Oologah, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT give verbal or written warnings to our employees, or otherwise discipline them, because they engage in union or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any reference to our discipline of Jay Bickel on September 25 and November 6, 1992, and WE WILL notify him that we have done so and that the discipline will not be used against him in any way.

PUBLIC SERVICE COMPANY OF OKLAHOMA (PSO)

Lyn R. Buckley, Esq., for the General Counsel.
Kristen L. Gordon and *Lynn Paul Mattson, Esqs.*, of Tulsa, Oklahoma, for the Respondent.
Stanley Patterson, of Tulsa, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Tulsa, Oklahoma, on February 8 and 9, 1994, on the General Counsel's complaint, as amended, which alleged that the Respondent issued a verbal warning to employee Jay Bickel in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

The Respondent admitted that it gave Bickel a verbal warning on September 25, 1993,[1] which was withdrawn and replaced by another on November 6. However, the Respondent denied that it in any way violated the Act.

Following the close of the hearing counsel submitted briefs. On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I issue the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

Public Service Company of Oklahoma (PSO) (the Respondent) is a public utility engaged in the business of providing electricity to customers in the State of Oklahoma. In the conduct of this business, the Respondent annually derives gross revenues in excess of $250,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are 1992, unless otherwise indicated.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the second paragraph of his decision, the judge inadvertently stated that the Respondent gave Bickel a verbal warning on September 25, 1993, rather than 1992.

In the absence of exceptions, we find it unnecessary to pass on the judge's reliance on *Highland Yarn Mills*, 310 NLRB 644 (1993).

[2] We shall issue a new notice to provide standard remedial language.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 1002, AFL–CIO (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

For many years the Union has had collective-bargaining agreements with the Respondent.[2] Jay Bickel is a maintenance mechanic at the Respondent's northeast stations 3 and 4, where the events here took place, and is the Union's shop steward. During the 2-week period which included September 24, northeast stations 3 and 4 was in a planned outage for maintenance. During this period, though not normally, Bickel's supervisor was Tracy Babst. Her supervisor was Maintenance Superintendent Scott Quaid.

Early on September 24, while Babst was meeting with the other mechanics, Bickel came into the room and announced that he had to use the telephone. Bickel was not in this meeting with the other mechanics because he was handling an employee grievance in his capacity as steward. Babst testified that Bickel walked paralled to the table where she was standing, and without stopping, stated that he was going to use the telephone.

Then about 2 hours later, according to Babst, Bickel again interrupted a meeting she as holding to state that he was going to use the phone ''to call the hall.'' Since she had learned on September 22, again as a result of an incident involving Bickel, that phone use should be limited to breaks, she told Bickel he would have to wait. He protested, stating that he had a ''Federal'' right to use the phone then.

At about 1:30 p.m. that day, as Babst's employees were returning from their lunchbreak, there arose a dispute concerning their dinner breaktime the previous week. During the outage employees were required to work 12 hours, with another 4 being voluntary. This affected how they would be paid for their dinner break. In effect, Babst was taking the position that they would not be entitled to one-half hour of pay which the employees thought they should get. During the discussion, Bickel said something to the effect of letting Babst have her way and they would file a grievance.

Babst testified that she decided to relent and pay the men for the one-half hour; however, Bickel still suggested that they should file a grievance.

Finally on September 24, after Bickel returned from dinner and had redressed in his work clothes, he went to the coal yard to talk to an employee who had earlier said he wanted to file a grievance. Supervisor Bob Noble was meeting with employees and, according to his testimony, when Bickel said he would not talk to them with Noble present, Noble said, ''Well, you go on back to work and I will arrange a time for you to meet with these guys.''

Shortly thereafter, Nobel observed Bickel outside the security fence, in the parking lot, talking to an employee, presumably as that employee was leaving work. Nobel concluded that Bickel had disobeyed his direct order to return to work, since Bickel's work assignment at that time was on the precipitator, which was several hundred yards from the coal maintenance office.

The next day, Babst, Nobel, and Quaid met to discuss the events of September 24 involving Bickel, because, according to Nobel, ''everyone said, 'Let's sit down for a few minutes and see just what happened yesterday because we can't stand another day like yesterday.'''

The result was verbal warning to Bickel, which was memorialized by Quaid on October 16:

> On September 25, 1992, a verbal reprimand was given to you [in the presence of Tracy Babst and Jim Guilliams] for the following reasons:
>
> 1. Failure to request the use of the telephone.
> 2. Disrespectful action toward your supervisor.
> 3. Promoting action which would result in a grievance.
> 4. Willful disobedience of an order given by a supervisor.
>
> If you have any questions concerning this information, please advise.

A charge was filed and following an investigation, according to the November 5 memo written by Quaid,

> After repeated discussions with Bill Dayhoff [the Respondent's manager of labor relations], a decision has been made to rescind the verbal reprimand . . . [because] the NLRB official felt that a steward could indeed take action to initiate a grievance. . . . I felt strongly that Jay deserved a reprimand for his action concerning the promotion of a grievance; although, I agreed to rescind the verbal reprimand. . . . I will issue another verbal reprimand for Jay's failure to request the use of the telephone, disrespectful action toward a supervisor, and willful disobedience of an order given by a supervisor.

Bickel was informed of the revised reprimand on November 6, although it does not appear it was put in writing.

B. *Analysis and Concluding Findings*

1. *Jefferson Chemical* bar

In its posthearing brief, the Respondent for the first time contends that litigation of this matter is barred by operation of *Jefferson Chemical Co.*, 200 NLRB 992 (1972), since another case involving this Respondent and Union was tried before Administrative Law Judge Charno in Case 17–CA–16248 in May and October 1993. The Respondent argues that the facts of Bickel's reprimand were known to the General Counsel prior to completion of that hearing, therefore subsequent litigation is barred.

The Respondent did not raise this defense before or at the hearing here, though counsel for the General Counsel argued against its application just prior to resting her case-in-chief.

I reject the Respondent's belated reliance on *Jefferson Chemical*, supra, and *Peyton Packing Co.*, 129 NLRB 1358 (1961). The policy of the rule established in these cases is to avoid piecemeal litigation and protect respondents from

[2] The 1991–1992 agreement offered into evidence by the Respondent is missing the two pages in which ''Union Rights'' are covered. Since there is no allegation or defense relying on the agreement, I do not consider this void of critical significance.

having to defend multiple actions. This is not jurisdictional or a rule of substantive law. Rather, it is a policy to promote administrative economy and fairness. Where, as here, the defense is raised after the trial and briefs there can be little hope of savings to the administrative process or the Respondent. I conclude that where a case is fully litigated, then a defense based on *Jefferson Chemical* and *Peyton Packing*, supra, should be rejected as untimely.

Further, to sustain such a defense, the Respondent has the burden of showing prima facie that the General Counsel knew, or reasonably should have known, about the new events at the time the first complaint was being tried and that the new allegations were closely related to those in the first complaint. *Highland Yarn Mills*, 310 NLRB 644 (1993). There are insufficient facts in the record to conclude that the Respondent met its burden, even if the bar defense could be considered timely.

2. Bickel's discipline

All of Bickel's activity on September 24 for which he was reprimanded occurred in connection with his functioning as a union steward. The reprimand resulted from Quaid's opinion ''that his behavior during this week was unacceptable for a union steward. I explained to him [Bickel] that the steward position was a respected position in the eyes of the other mechanics, and that he should present exemplary character at all times.'' This is from Quaid's September 25 file memo recounting the discipline interview with Bickel.

It is clear from this and subsequent memos written by Quaid, as well as his testimony, that the motivating factor for the discipline of Bickel was his position and activity as the union steward. Such is clearly concerted union activity protected by the Act. Therefore, discipline of one for having engaged in such activity is violative of Section 8(a)(1) and (3) of the Act, unless the Respondent can prove that Bickel would have been disciplined had he not been the steward engaged in union activity. *Wright Line*, 251 NLRB 1083 (1980).

This the Respondent failed to do. Indeed, it is clear that even after the first reprimand was withdrawn, Quaid continued to believe that Bickel should have been disciplined for attempting to promote the filing of a grievance. That was the principal unacceptable act in the first warning. Though Quaid professed to be of the opinion that the other acts independently warranted discipline, I conclude they would not have moved the Respondent to discipline Bickel or anyone else absent the grievance matter.

Individually or together, these other acts of allegedly unacceptable behavior were trivial in the extreme. According to Quaid, he had never had to discipline any employee, which suggests that the Respondent does not routinely issue warnings for such trivial matters. And there is no evidence to support a rational basis to start a course of discipline with Bickel, other than his union activity.

The first event occurred at about 8 a.m. when Bickel came into the room where Babst was conducting a meeting and (from Quaid's memo) ''demanded to use the phone, and then walked out. I stated that this is unacceptable behavior, and that he must request (and be granted permission) to use the phone except during breaks or lunch-hours.'' It appears that critical to this, from Quaid's viewpoint, was Bickel's demand to use the phone, rather than a request.

Perhaps Bickel could have been more civil in his approach to Babst, who was a new supervisor to him. However, to conclude that such is a normal basis for discipline in a shop does not have the ring of credulity. Bickel's demand arose in the context of his dealing with the grievance of an employee, a fact which was known to Babst and Quaid. I, therefore, find incredulous that Bickel would have been disciplined for this act absent his engaging in protected activity.

An almost identical event occurred 2 hours' later. Bickel demanded use of the phone to call ''the hall.'' Again Babst felt her status as a supervisor had been disrespected. Again, Bickel might have been more respectful in stating his request. Nevertheless, I cannot conclude that Bickel acted in a way which in the ordinary course of events would have caused the Respondent to give him a disciplinary warning absent such arising out of his union activity.

In concluding that the Respondent would not have disciplined Bickel absent his union activity, I have generally credited Babst. It may well be that as a new supervisor at this station she felt put upon. But such does not justify giving a disciplinary warning to one lawfully engaged in union activity. Quaid admitted that he knew Bickel was doing union business both times that he sought to use the telephone. The discipline here was based solely on Quaid's subjective judgment of what constituted generally inappropriate behavior for a steward.

The final event is Bickel's alleged failure to obey an order of a supervisor. All parties agree that about 7 p.m. Bickel asked to speak to Nobel's men in connection with a grievance matter. All agree that Bickel told Nobel he wanted to speak to them without Nobel being present. All agree that Nobel said he would arrange for this the next morning. And all agree that Bickel left and a few minutes later was seen outside the security gate talking to an employee who was in his truck.

The only point of disagreement is whether Nobel told Bickel ''Well, you go on back to work.'' Though Bickel, and other employees who witnessed this event, testified that Nobel said no such a thing, it is more credible that he did. At least implicit in Nobel's statement was that Bickel should return to work. And even without Nobel saying so, such would be understood by Bickel. However, this does not mean Nobel gave Bickel a direct order which Bickel disobeyed. The principal trust of Nobel's statement was he would arrange for Bickel to talk to the men the next morning. That Bickel should then return to work was to state the obvious and was simply a comment closing the conversation. Bickel certainly would have returned to his job without being told to do so by Nobel. There is no reason to believe Nobel needed to order Bickel to return to work or that there was any question on the part of either that Bickel should return to work. And in fact, he did so. In context, Nobel's statement was an offhand remark and not one reasonably to be construed as a direct order, any deviation from which would be cause for discipline.

Further, the fact that Bickel tarried a few minutes in route back to work does not seem of great significance. Although the Respondent was in a maintenance outage and was requiring a great deal of overtime, the looseness with which employees took their evening dinner break belies Nobel's testimony that every minute counted. Employees were allotted 1

hour to change and go to dinner; but often they took up to 1-1/2 hours and this was not considered a problem.

I conclude that this alleged refusal to obey a supervisor was case building by Quaid. I conclude it was one more event related to Bickel's union activity on September 24 which Quaid determined would warrant discipline. It is simply not rational that an employee not engaged in protected activity would have been so disciplined. I, therefore, conclude that the Respondent did not carry its burden under *Wright Line*.

I conclude that the motivating cause of Bickel's discipline on September 25 was his union activity. This is clearly protected by the Act. While it is possible that one's union activity can be so opprobrious as to lose its protected character, such was not the case here. Therefore, the Respondent violated Section 8(a)(1) and (3) in giving Bickel the disciplinary warning. Further, I conclude this unfair labor practice continued with the reissuance of the warning on November 6, even though reference to promoting a grievance was omitted. Therefore, I shall recommend that an appropriate remedy for the Respondent's unlawful activity be ordered.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it should be ordered to cease and desist from this activity and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Public Service Company of Oklahoma (PSO), Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing employees verbal or written discipline because they engage in union or other activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful discipline of Jay Bickel and notify him in writing that this has been done and that the warning will not be used against him in any way.

(b) Post at its northeast stations 3 and 4 in Tulsa, Oklahoma, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''